

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**IN RE NAMENDA DIRECT PURCHASER  
ANTITRUST LITIGATION**

**THIS DOCUMENT RELATES TO:  
All Direct Purchaser Actions**

**Case No. 1:15-cv-07488-CM-RWL**

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN*  
*LIMINE* NO. 4: PRECLUDE OR LIMIT FOREST'S USE OF EXPERT  
OPINION TESTIMONY AS A PROXY FOR FOREST'S ALLEGED  
SUBJECTIVE BELIEFS REGARDING THE STRENGTH OF THE '703  
PATENT WHERE FOREST BLOCKED ALL DISCOVERY REGARDING  
ITS SUBJECTIVE BELIEFS OR STATE OF MIND**

**TABLE OF AUTHORITIES**

**Cases**

<i>Bouchard v. Am. Home Prods. Corp.</i> , 2002 U.S. Dist. LEXIS 27517 (W. D. Ohio May 24, 2002).....	2
<i>In re Diet Drug Prods. Liab. Litig.</i> , 2000 U.S. Dist. LEXIS 9037 (E.D. Pa. June 20, 2000).....	2
<i>In re Namenda Direct Purchaser Antitrust Litig.</i> , 331 F. Supp. 3d 152 (S.D.N.Y. 2018).....	1
<i>On Track Innovations Ltd. v. T-Mobile USA, Inc.</i> , 106 F. Supp. 3d 369 (S.D.N.Y. 2015).....	1-2

Forest has elected not to offer any evidence at trial regarding the subjective beliefs of its current or former business executives or employees relating to whether “its position in the patent case was weak.” Ex. 1, Forest’s Disclosure Pursuant to the May 19, 2017 Mem. and Order (“Election”) at 5 (also available at ECF No. 714-1). But Forest presumes that it will be able to offer “objective evidence” from “experts knowledgeable about the underlying technology, [and] the patented inventions (including the validity, enforceability, and infringement by generic ANDA filers of the asserted patent)” to rebut any suggestion that its patent case was weak. *Id.* Forest’s apparent strategy is to have the jury substitute the “objective” opinion of its patent expert, Roderick McKelvie, for Forest’s “subjective” views, which it withheld from discovery. Forest has already attempted a variation of this trick to circumvent its Election by ascribing the views of Dr. Reddy’s Labs, one of its co-defendants in the end-payor case, to itself and *all* generics and is thus attempting to imbue DRL’s views with an air of objectivity. *See* Pls.’ Opp’n to Defs.’ Mot. to Supplement Expert Reports at 3, 11-12, ECF No. 713 (the “Supplementation Opp’n”). But Mr. McKelvie’s opinion, divorced from Forest’s actual views about the merits of the ’703 patent and litigation (ECF No. 696-4, McKelvie Rpt. at ¶¶ 16-17, 128-29), cannot be used as an evidentiary proxy or surrogate for Forest’s true – but withheld – subjective beliefs regarding the patent strength.

It is well established that an expert cannot opine on a party’s intent or state of mind. *In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, 174 (S.D.N.Y. 2018) (“Professor Elhauge must qualify his opinions by testifying that ‘it would have been economically rational for both parties’ to enter into a no-payment settlement in a but-for world by specific dates, not that they necessarily *would have*.”) (Emphasis in original.) Nor can an expert’s opinion be used as evidence by which a party’s state of mind may be inferred. *See On*

*Track Innovations Ltd. v. T-Mobile USA, Inc.*, 106 F. Supp. 3d 369, 412 (S.D.N.Y. 2015) (“Nor may a putative expert simply theorize as to a party’s intent based on the factual record.”); *Bouchard v. Am. Home Prods. Corp.*, 2002 U.S. Dist. LEXIS 27517, at \* 17 (W.D. Ohio May 24, 2002) (expert opinion testimony about Wyeth’s corporate intent was inadmissible); *In re Diet Drug Prods. Liab. Litig.*, 2000 U.S. Dist. LEXIS 9037, at \*30 (E.D. Pa. June 20, 2000) (“[T]o the extent that AHP’s motions seek to preclude Drs. Avorn and Rubin from testifying about the corporate intent of AHP, the Court will grant the motions.”). But this is precisely what Forest hopes to do here. Ex. 1, Election at 5; ECF No. 696-4, McKelvie Rpt. at ¶¶ 16-17, 128-29.

Plaintiffs acknowledge that Mr. McKelvie’s opinion testimony may be relevant to some issues. For example, it could be relevant to (1) Plaintiffs’ causation theory based on establishing that absent the settlement, Mylan would have prevailed in the patent litigation; or (2) to contest Prof. Elhauge’s reliance on the opinions of Plaintiffs’ patent expert (Prof. Johnston) as an input to Prof. Elhauge’s opinion regarding a no-payment settlement entry date. But Mr. McKelvie’s opinions cannot serve as evidence of Forest’s actual subjective beliefs about the merits of its patent lawsuit or its state of mind.

Accordingly, Plaintiffs respectfully request that opinion testimony of Mr. McKelvie be excluded to the extent Forest seeks to use it as a proxy for Forest’s own subjective beliefs regarding the strength of the ’703 Patent. Should the opinion testimony be admitted for some relevant purpose, Plaintiffs will propose an appropriate limiting instruction.

Dated: May 24, 2019

David F. Sorensen  
Ellen T. Noteware  
Daniel C. Simons  
Berger Montague PC  
1818 Market Street – Suite 3600

Respectfully Submitted:

/s/ Dan Litvin

Bruce E. Gerstein  
Joseph Opper  
Kimberly M. Hennings  
Dan Litvin  
Garwin Gerstein & Fisher LLP

Philadelphia, PA 19103  
(215) 875-3000  
(215) 875-4604 (fax)  
dsorensen@bm.net  
enoteware@bm.net  
dsimons@bm.net

Peter Kohn  
Joseph T. Lukens  
Faruqi & Faruqi, LLP  
1617 John F Kennedy Blvd., Suite 1550  
Philadelphia, PA 19103  
(215) 277-5770  
(215) 277-5771 (fax)  
pkohn@faruqilaw.com  
jluken@faruqilaw.com

88 Pine Street, 10th Floor  
New York, NY 10005  
Tel: (212) 398-0055  
Fax: (212) 764-6620  
bgerstein@garwingerstein.com  
jopper@garwingerstein.com  
khennings@garwingerstein.com  
dlitvin@garwingerstein.com

David C. Raphael, Jr.  
Erin R. Leger  
Smith Segura & Raphael, LLP  
3600 Jackson Street, Suite 111  
Alexandria, LA 71303  
Tel: (318) 445-4480  
Fax: (318) 487-1741  
draphael@ssrllp.com  
eleger@ssrllp.com

Stuart E. Des Roches  
Andrew W. Kelly  
Odom & Des Roches, LLC  
650 Poydras Street, Suite 2020  
New Orleans, LA 70130  
Tel: (504) 522-0077  
Fax: (504) 522-0078  
stuart@odrlaw.com  
akelly@odrlaw.com

Russ Chorush  
Heim Payne & Chorush, LLP  
1111 Bagby, Suite 2100  
Houston, TX 77002  
Tel: (713) 221-2000  
Fax: (713) 221-2021  
rchorush@hpcllp.com

***Counsel for the Direct Purchaser Class Plaintiffs***

**CERTIFICATE OF SERVICE**

I hereby certify that on May 24, 2019, I electronically filed the above by CM/ECF system.

Respectfully submitted,

/s/ Dan Litvin .  
Dan Litvin